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No. 110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE FIRESTONE TIRE & RUBBER COMPANY, *Appellant*

v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, BURTON CHACE, CHAIRMAN, FRANK BONELLI, WARREN DORN, JOHN ANSON FORD AND KENNETH HAHN, CONSOLIDATED COUNTY FIRE PROTECTION DISTRICT, AND KEITH KLINGER

Appeal From the District Court of Appeal of the State of California, Second Appellate District

PETITION FOR REHEARING

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PETITION FOR REHEARING

The appeal in this cause was dismissed and *certiorari* denied by an order of this Court entered on October 12, 1959. On October 23, 1959 the time within which to petition for rehearing was extended to and including December 4, 1959. This petition is filed pursuant to Rule 58-1 of the Rules of this Court.

JURISDICTION

The absence in this Court's order of dismissal of any statement of grounds or citation of authority makes it impossible for appellant to ascertain the basis upon which appellate jurisdiction of this cause was found wanting. It may be that the Statement as to Jurisdiction failed to spell out with sufficient particularity the basis upon which appellate jurisdiction is believed to rest; accordingly, a more detailed showing as to jurisdiction is set forth below.

Appellant duly raised and preserved the constitutional question in the trial court (Juris. Statement 8), in the District Court of Appeal and in the Supreme Court of California.[1] The pertinent holdings of the District Court of Appeal (the highest California court which heard the case) were as follows:

> 1. The proceedings leading to the annexation of appellant's land to a county fire protection district were unlawful under the then applicable state statute, as a result of "vitally defective" notice (Juris. Statement App. "A" 7).
>
> 2. A subsequent general validating statute sought to be applied here is limited by its terms to annexations not originally void under the Constitution of the United States (Juris. Statement App. "A" 8).
>
> 3. The notice by publication in the instant annexation proceedings "does not comport with due

[1] See Appellant's briefs in the District Court of Appeal (Brief in Support of Motion for Summary Affirmance 24, 25, 26-29, 39; Reply Br. 5-11, 49-53, 71-75; Pet. for Rehearing 7-11, 21-25) and the Petition for Hearing in the California Supreme Court (pp. 18-22, 25-27).

process within the rationale of the recent decisions of the Supreme Court of the United States"[2] (Juris. Statement App. "A" 9).

4. The validating statute nevertheless operated to legalize the defective annexation because, in the circumstances, there was no constitutionally protected right under the Due Process Clause of the Fourteenth Amendment to *any* notice prior to annexation (Juris. Statement App. "A" 10-13).

Thus the First Validating Act of 1958 was applied in a manner contended by appellant to render it repugnant to the Due Process Clause of the Fourteenth Amendment, and the Act was sustained against such contention. The federal question was squarely raised and passed upon, and there was no independent state ground upon which decision was rested.

It is settled law that even if a state statute is valid on its face, a decision of a state court applying the statute against a particular transaction in the face of a claim of unconstitutionality necessarily affirms the validity of the statute when so applied. The judgment is therefore reviewable by appeal as of right pursuant to 28 U.S.C. 1257 (2). *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951) 22. See also *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306 (state statute held invalid on appeal as applied to certain persons who were given notice by publication only); *Walker* v.

[2] The court below cited the following decisions of this Court: *Mullane* v. *Central Hanover B. & T. Co.*, 339 U.S. 306; *Walker* v. *City of Hutchinson*, 352 U.S. 112; *Wisconsin Electric Power Co.* v *City of Milwaukee*, 352 U.S. 948.

City of Hutchinson, 352 U. S. 112, 115 (appeal held to lie from state statute providing notice by publication, and statute held invalid as to certain persons who could reasonably have been given personal notice); *Chesebro* v. *Los Angeles County Flood Control District*, 306 U. S. 459, 463.

QUESTIONS PRESENTED[3]

A state statute permits annexation of territory to a county fire protection district only upon a determination by a county board of supervisors, after notice and hearing, that the land annexed is to be benefited. A purported annexation of property effected without actual notice, and without compliance with the provisions of the annexation statute for notice by publication, was held invalid by the court below. The annexation was nevertheless held to have been legalized by a subsequent statute providing for validation of defective transactions of public bodies generally,[4] specifically excepting, however, those transactions which could not be constitutionally validated.

The questions presented are:

1. Whether, under the rule of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, a determination of a question as to what lands shall be

[3] While it is believed that the Federal questions in this case are substantial, clear cut and important, it is recognized that they may not have been stated with sufficient precision in the Statement as to Jurisdiction. Accordingly, we take the liberty of restating them.

[4] First Validating Act of 1958 (Juris. Statement App. "B" 18). The statute in sweeping terms purported to legalize proceedings of various kinds previously completed before more than 75 different kinds of public bodies in the State of California.

included in an assessment district, required by statute to be made after decision by a state tribunal as to whether the land included will be benefited, may constitutionally be made without personal notice where the interest, name and address of the property owner affected were known by, in the possession of and readily available to the state tribunal; and

2. Whether, under the Due Process Clause of the Fourteenth Amendment, an annexation invalid for lack of notice to an affected property owner may constitutionally be validated by subsequent, blanket curative legislation which neither contains nor imports any finding that the particular annexation at issue would benefit the land annexed or otherwise serve the public interest.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

In the Statement as to Jurisdiction appellant may have failed to state with sufficient clarity the importance to the field of municipal law of t constitutional issues here presented.

This Court may judicially notice the existence of thousands of special taxing districts created in the various states for the purpose of obtaining revenue to finance particular improvements or particular activities of government. It is no exaggeration to say that if the decision to dismiss the appeal in this case stands, the decision below will be widely (and we think correctly) interpreted as furnishing a ready guide to defeating established due process rights in a myriad of cases. If the decision below stands unreversed, certain thoroughly established constitutional principles will

have been undermined, and several decisions of this Court overruled *sub silentio*. After briefing and argument of the case on the merits, this Court might conceivably affirm the decision below, but it is respectfully urged that any such departure from settled law should take place only after the fullest consideration.

1. Constitutional Test as to Adequacy of Notice

A series of decisions of this Court in recent years have emphasized the salutary principle that "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306, 314.[5]

As this Court has had occasion to remark, "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *New York* v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 296. In the present case, the Court is not confronted with a borderline type of notice found by a state court to be adequate to meet the reasonable notice test. The court below, having reviewed the standards established by this Court's decisions, held as follows (Juris. Statement App. "A" 9):

> The notice given here was not one of a character designed to bring home to the persons affected knowledge of the proceedings or to put them upon inquiry but was apparently designed as a mere

[5] Accord: *Milliken* v. *Meyer*, 311 U.S. 457; *Covey* v. *Somers*, 351 U.S. 141; *Walker* v. *City of Hutchinson*, 352 U.S. 112. And see *Lambert* v. *California*, 355 U.S. 225, 228.

> token compliance with the statute without regard as to whether it was in fact reasonably certain to inform those affected. *Such notice does not comport with due process within the rationale of the recent decisions of the Supreme Court of the United States.* [Emphasis added.]

The court below found that the "notice" here failed actually to inform appellant (Juris. Statement App. "A" 7), that it failed to comply with the applicable state statute (*id.* 6-8), and that notice by mail could reasonably have been given (*id.* 10). On the basis of the facts of record (Juris. Statement 6-7), it is inconceivable that any other conclusion could have been reached.

2. Constitutional Requirement as to Notice

Having recognized that if any notice was required, the "notice" here was insufficient under the Due Process Clause of the Fourteenth Amendment, the court below proceeded to hold that no notice was required. This conclusion was reached in connection with the court's consideration of the possible application of a curative statute—the First Validating Act of 1958 (Juris. Statement App. "B" 18). The abortive annexation having been held illegal (Juris. Statement App. "A" 7-8), the court noted that the curative statute, which validates on a blanket basis a variety of transactions of more than 75 different kinds of public bodies,[6] "does not purport to validate any ordinance or resolution which is void because of lack of due process * * * " (*id.* 8). Thus the court was squarely presented with the constitutional question as to the validity of the original annexation proceeding, and it proceeded squarely to pass upon it.

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[6] See list, Juris. Statement App. "B" 18-20.

The court below held that, since the legislature itself could have made the determination as to the boundaries of a fire protection district without notice and hearing, and could have delegated such legislative authority to a municipality, the purported annexation here was not violative of due process. Hence, the validating statute applied. In reaching this conclusion the court misread or misapplied the decisions of this Court. (Juris. Statement App. "A" 10-13.)

Since the decision in 1896 in the leading case of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, it has been established law that where, as here, a state legislature entrusts to a subordinate tribunal the function of determining whether land would be benefited by being included in a special tax district, the owners of the land affected are entitled to notice and hearing prior to the determination. The distinction explicitly drawn in that case is as follows (*id.* at 174-175):

> It has been held in this court that the legislature has power to fix such a [taxing] district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, *when it fixes the district itself*, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district; and the citizen has no constitutional right to any other or further hearing upon that question. * * * But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited; and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are

> thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. [Emphasis added.]

The distinction has been followed throughout the years. Thus, in cases where the legislature itself fixed the boundaries of a tax district or made the determination as to benefit, the Court has held the determination to be conclusive.[7] And where the full powers of the legislature have been delegated to a municipality, the same result has obtained.[8] But in all those cases where a subordinate organ of the state was given a fact-finding function with respect to benefit, the property owner has been held entitled to be heard before that quasi-judicial determination is made.

In the *Fallbrook* case, *supra*, the statute was construed as contemplating the requisite hearing. On the other hand in *Embree* v. *Kansas City and Liberty Boulevard Road District*, 240 U. S. 242, the Court held that (p. 247):

> As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative decision that its location, boundaries, and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the landowners be accorded an opportunity to be

[7] *E.g. Wagner* v. *Baltimore*, 239 U.S. 213; *Valley Farms Co.* v. *Westchester*, 261 U.S. 155; *Milheim* v. *Moffat Tunnel District*, 262 U.S. 710; *Chesebro* v. *Los Angeles County Flood Control District*, 306 U.S. 459.

[8] *E.g. Withnell* v. *Ruecking Construction Co.*, 249 U.S. 62; *Hancock* v. *City of Muskogee*, 250 U.S. 454.

heard upon the question whether their lands would be thus benefited.

The same result was reached in *Browning* v. *Hooper*, 269 U. S. 396, where the Court held as follows (405):

> Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. * * * *But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement.* [Emphasis added.]

The annexation procedure provided by the California legislature was exactly the kind which this Court held in *Fallbrook*, *Embree* and *Browning*, *supra*, must be preceded by adequate notice to affected property owners.[9] As the court below recognized (Juris. Statement, App. "A" 13), the legislature conferred upon the county board of supervisors a quasi-judicial function. That function was performed without due process being accorded to appellant.

The "hearing" held by the board of supervisors did serious violence to traditional concepts of fair play and due process. One John Hughes, a Fire Rating

[9] Health and Safety Code of State of California, Sections 14510-14515, Juris. Statement App. "B" 16-17. The Government Code of California, Section 58230, provides that "Any tract of land may be annexed to a district if the land will be benefited * * *." This section applies to county fire protection districts. Government Code, Section 58308.

Analyst who was an employee of the Los Angeles County Consolidated Fire District, testified as to the benefit question and no other evidence was offered because appellant was unaware that the proceeding was being conducted. The board duly found that appellant's property would be benefited and ordered the annexation. *The adversary proceeding contemplated by the statutory scheme never took place.*

It is significant that the only testimony before the board was perfunctory and pro forma. Hughes was asked the following two general questions, applicable to thirteen different annexation proceedings involving three separate fire protection districts (Juris. Statement App. "A", 5):

> Q. "Are you familiar with the territory sought to be annexed to the various Fire Protection Districts?"
>
> A. "I am."
>
> Q. "In each instance, in your opinion would the territory [proposed to be annexed] be benefited by the annexation if consummated?"
>
> A. "It would."

Appellant, as a result of not receiving notice of the proceeding, was deprived of the opportunity to challenge this vague opinion testimony or to offer substantial evidence on its own behalf to establish that inclusion of its property within the district would subject appellant to substantial liability for tax assessments (Health and Safety Code, Section 14516, Juris. Statement App. "B", 17) with no benefit to appellant.

After the abortive annexation proceedings, the legislature of California enacted the First Validating Act

of 1958 (Juris. Statement App. "B" 18), curative legislation of a general nature. But it could hardly be argued—certainly the court below did not hold—that this statute constituted an independent judgment by the legislature that this annexation (or any other particular annexation) was desirable.

The statute is blanket in character. It validates an indeterminate number of transactions whose identity, in the nature of things, could not be known to the legislature. In recognition of the catch-all character of the legislation, the statute specifically excepted from the categories of transactions validated any transaction initially void for lack of due process (Section 6 (b), Juris. Statement App. "B" 23).[10]

As the opinion of the court below recognized, the validating statute was not a new act of annexation; it purported only to validate previous transactions generally to cure purely technical defects (Juris. Statement App. "A" 8). The defect here was not technical—it was basic and constitutional in character.

By construing the validation statute to pour life into the previous void annexation attempt, the court below has made that statute an instrument for depriving appellant of due process of law. It has interpreted the statute in a manner which deprived appellant of

[10] If the legislature made an independent judgment at some later time that a particular annexation was desirable, its action in doing so might be held to import findings as to benefits. *Spencer* v. *Merchant*, 125 U.S. 345. But clearly such an action would have to be taken in a manner in which the finding as to benefit would be implicit. As was said in *Chesebro* v. *Los Angeles Co. Flood Control Dist.*, 306 U.S. 459, 462, the "particularity of the description" by the legislature may import the finding. In the present case, there was no particularity of description.

the constitutional right of hearing under the rules laid down by this Court in *Fallbrook*, *Embree* and *Browning*, *supra*. The statute was construed to legalize a proceeding depriving appellant of the reasonable notice to which it was constitutionally entitled under the rule of *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306, and the other decisions of this Court respecting notice which are discussed above.[11]

The decision below would circumvent due process requirements by the device of labeling fire protection districts of the kind here involved "public corporations in the nature of municipalities" (Juris. Statement App. "A" 11). But the label applied to the district or the tribunal cannot affect the constitutional question and no case cited by the court below suggests that it can. Under the governing statute, the district here involved was only to be expanded if it was decided after hearing that the annexed land would be benefited thereby. The

[11] This Court is of course bound by the construction placed upon the statute by the court below. But this case illustrates how construction of a statute may unnecessarily make it repugnant to the Constitution. Had the validating statute been construed in accordance with its apparent intent, it seems evident that it would not have been applied to validate a constitutionally void annexation. Moreover, another section of the statute (Section 6(c)) in terms specifically exempts transactions being challenged in "legal proceedings" at the time of its enactment. Appellant at that time was vigorously challenging the validity of the annexation before the board of supervisors, but the court below held that the proceedings before the board did not constitute "legal proceedings," on the theory that the board had by that time exhausted its "quasi-judicial" function. Thus legal proceedings conceived to have been in the wrong forum were held not to be legal proceedings at all.

The judicial tendency reflected by this construction—to uphold annexation decisions by a board of supervisors even if a strained statutory construction results—serves to emphasize the intense practical importance of the constitutional right to advance notice of annexation proceedings.

decisions of this Court reviewed above make it clear that when that kind of decision is intrusted to a subordinate tribunal (whether municipal or otherwise) the right to notice and hearing is constitutionally protected.

State courts (other than the court below) which have had occasion to consider the question here presented have interpreted this Court's decisions as does appellant. Thus, in *Wisconsin Electric Power Co.* v. *City of Milwaukee*, 352 U. S. 948, this Court remanded to the Supreme Court of Wisconsin for consideration in light of the decision in *Mullane, supra*, a case involving a special assessment district where a taxpayer had been deprived of the opportunity to be heard because of lack of effective notice. On the remand, the applicable city charter provision providing for notice by publication was held invalid on the express authority of the *Mullane* decision. 275 Wis. 121, 81 N. W. 2d 298. And in a case on all fours with the present one the Supreme Court of Montana squarely held a fire protection district annexation invalid under the Due Process Clause of the Fourteenth Amendment for lack of reasonable notice, citing the *Mullane* decision *inter alia*. *Great Northern Ry. Co.* v. *Roosevelt County*, ___ Mont. ___, 332 P. 2d 501.

If the dismissal of this appeal is allowed to stand this Court will have indirectly ruled that the Wisconsin and Montana courts of last resort have misconstrued this Court's clear pronouncements in the *Mullane* case, *supra*, and other decisions delineating the constitutional standard as to reasonable notice. If this dismissal is allowed to stand, the unbroken line of decisions commencing 63 years ago with *Fallbrook Irrigation District* v. *Bradley, supra*, will in effect be overruled, and

the constitutional standards thought to have governed quasi-judicial proceedings of the type there involved will be drained of vitality.

If this Court is disposed to modify or overrule these settled lines of decisions, it is earnestly believed the Court should do so only after plenary briefing and argument, and the new rule should be articulated and delimited in an authoritative opinion of the Court. It would be consistent neither with judicial responsibility nor with the orderly development of law if a far-reaching departure from settled law should be effected through dismissal of an appeal.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, the order of dismissal vacated, and probable jurisdiction noted.

Respectfully submitted,

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December 4, 1959

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

J. ROGER WOLLENBERG